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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

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| RATE ADJUSTMENT DUE TO<br>EXTRAORDINARY OR EXCEPTIONAL<br>CIRCUMSTANCES | )<br>)<br>) | Docket No. R2013-11 |

**REPLY COMMENTS OF**
**MPA—THE ASSOCIATION OF MAGAZINE MEDIA,**
**THE AMERICAN CATALOG MAILERS ASSOCIATION, INC.,**
**DIRECT MARKETING ASSOCIATION, INC.,**
**ALLIANCE OF NONPROFIT MAILERS,**
**NATIONAL NEWSPAPER ASSOCIATION,**
**QUAD/GRAPHICS, INC., RR DONNELLEY,**
**SOFTWARE & INFORMATION INDUSTRY ASSOCIATION/**
**AMERICAN BUSINESS MEDIA, AND TIME INC.**
**(December 6, 2013)**

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"The Postal Service's justifications for its specific pricing proposals underscore its misunderstanding of the proper role for exigency-based increases. As another Postal Service witness explained, '[p]eriodicals has been losing money as a class for years,' and the 'inflation-based price cap limitation at the class level has made it difficult to make significant progress in restoring Periodicals to complete cost coverage.' Kiefer Statement 39 . . . The Postal Service thus saw this 'price change' as a 'unique opportunity to take some steps toward increasing Periodicals revenue and improving cost coverage.' *Id.* Again, the authority to raise prices due to either extraordinary or exceptional circumstances was not designed to provide a 'unique opportunity' to address problems that have persisted 'for years.' Rather, the new pricing regime was designed to require the Postal Service, absent exigent circumstances, to address such issues through improved efficiency while operating within the constraints of the price cap."

Brief of Postal Regulatory Commission as respondent in *USPS v. PRC*, No. 10-1343 (D.C. Cir., filed January 14, 2011) at 35-36.

"The Commission finds that exigent rate adjustments must be causally linked to the net adverse financial impact of the exigent circumstances rather than the amount of revenue lost. Given the exigent circumstances found to have occurred in this case, the net adverse financial impact would consist of the lost contribution *associated with the volume declines from the 2008-2009 recession*."

Postal Regulatory Commission Order No. 1059 in Docket No. R2010-4R (December 20, 2011) at 6-7 (emphasis added).

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**(December 6, 2013)**

The undersigned parties respectfully submit these reply comments. They concern the pricing of Periodicals Mail and Standard Mail Flats and, in particular, respond to the suggestion that above-average price increases should be imposed on these mail products to compensate for their failure to generate enough revenue to cover the costs attributed to them by the Commission and the Postal Service.

## I. INTRODUCTION AND SUMMARY

No participant has advocated imposing above-average exigent price increases on Periodicals Mail or Standard Mail Flats as its preferred outcome in this docket. The rate increase proposed by the Postal Service is essentially uniform for all market-dominant products. And the two participants that have argued for imposing above-CPI rate increases on Periodicals Mail and Standard Mail flats in other Commission proceedings since 2006—the Public Representative and Valpak—oppose any price increases in this docket for *any* mail product or class. Public Representative Comments (November 26, 2013) at 47; Valpak Comments (November 26, 2013) at 106. The Public Representative argues in the alternative, however, that "*if* the Commission approves the Postal Service's Request, it should adjust the proposed prices to ensure that unprofitable products receive larger price increases than profitable products." Public Rep. at 45. Moreover, Valpak renews its perennial claim that rates on "underwater" products should be raised in *some* docket (although not in this docket). Valpak comments at 48-77, 86-88.

Whatever overall rate increase (if any) the Commission approves in the docket,[1] there is no legal basis for imposing an above-average increase on Periodicals Mail or Standard Mail Flats, and several reasons not to. The Commission, as it has acknowledged repeatedly, has no general authority to raise average rates on Periodicals Mail faster than inflation as measured by the CPI. Periodicals Mail is a mail class of its own, not just a rate category or product. Section 3622(d) generally limits the average price increase for any market-dominant class of mail (as defined in the Domestic Mail Classification Schedule on the date of enactment (*see* 39 U.S.C. § 3622(d)(2)(A)) to the rate of inflation as measured by the CPI. The Commission has acknowledged this limitation repeatedly; the Court of Appeals recognized the same in remanding ACR 2010; and the Commission reaffirmed the same in the remanded

[1] On November 26, 2013, the undersigned parties and several other parties jointly sponsored comments in this docket proposing that the Commission allow the Postal Service to recover no more than $351 million per year in extra contribution from any exigent increases, for a maximum of two years beginning on January 26, 2014.

proceedings. *USPS v. PRC*, 676 F.3d 1105, 1108 (D.C. Cir. 2012), on remand, Order No. 1427 (Aug. 9, 2012) at 17-19.

Above-average price increases on Periodicals Mail and Standard Mail Flats also cannot be justified under 39 U.S.C. § 3622(d)(1)(E), the exception for "extraordinary or exceptional circumstances." Even if the Commission were to find that an overall increase in market-dominant rates in excess of inflation were warranted by Section 3622(d)(1)(E), the record in this case does not justify a disproportionate increase for Periodicals Mail or Standard Mail Flats. Section 3622(d)(1)(E) may justify an above-CPI rate increase only to the extent that (1) the losses are "due to . . . extraordinary or exceptional circumstances" and (2) recovery of the losses through an above-CPI rate increase is "reasonable and equitable and necessary" to allow the Postal Service to continue providing service "under best practices of honest, efficient, and economical management." *Id*.

Singling out Periodicals Mail or Standard Mail Flats is warranted by neither of these requirements. While the causes and even the accuracy of the reported failure of Periodicals Mail and Standard Mail Flats to cover the attributed costs continue to be debated, the phenomenon has existed for many years. There is nothing extraordinary or exceptional about it. Furthermore, if the critics of these two products are correct that they do not cover attributable costs, then the only effect of the 2007-2009 recession on those products that may be considered "extraordinary" or "exceptional" has been a *lessening* of the Postal Service's losses by the recession-induced *reduction* in the volume of these mail products. Moreover, the case for an above-CPI increase on these products is precluded by the Postal Service's failure to manage the costs of processing them in an “efficient” and “economical” fashion. Despite increasingly sophisticated and costly mail preparation by users of these products and a stream of technological changes, the Postal Service’s reported costs of handling them have risen faster than inflation for many years. The poorly managed rollout of the FSS is only one of many unforced errors in the Postal Service’s management of these products.

Finally, while Standard Mail Flats is not a class of its own, and its rates are therefore not capped by an absolute CPI cap, the Postal Service has recognized that increasing rates for Standard Mail Flats much faster than inflation would be harmful and counterproductive, and the Commission has accepted price increases of 1.05 times the rate of inflation on Standard Mail Flats as sufficient. The filing of an exigency case does not change these facts.

## II. THE 2007-2009 RECESSION CANNOT JUSTIFY DISPROPORTIONATE RATE INCREASES ON PERIODICALS MAIL OR STANDARD MAIL FLATS UNDER 39 U.S.C. § 3622(b)(1)(E) BECAUSE THE RECESSION WAS NOT THE CAUSE OF THE REPORTED LOSSES ON THOSE PRODUCTS.

The Postal Service’s lack of authority to impose above-CPI rate increases on Periodicals Mail outside the context of 39 U.S.C. § 3622(d)(1)(E) now appears to be generally conceded.[2] The question in this case is whether the failure of Periodicals Mail (and Standard Mail Flats) to cover their reported attributable costs would allow the

[2] Appendix A to these comments, *infra*, provides a detailed legal analysis of why the mere failure of a class to cover its reported attributable costs does not give the Commission authority to impose or approve an above-CPI rate increase on the class. The only other exception that can in some circumstances allow above-CPI rate increases—the existence of unused rate increase authority within the meaning of 39 U.S.C. § 3622(d)(2)(C)—does not apply here. Unused rate authority in both Periodicals and Standard Mail is currently negative.

Commission to single out these mail products for above-average rate increases if the Commission found that an overall rate increase greater than the CPI was justified under Section 3622(d)(1)(E). It would not.

Regardless of whether the 2007-2009 recession justifies any above-CPI rate increase for market-dominant mail as a whole, 39 U.S.C. § 3622(1)(d)(E) does not authorize the Commission to use an exigent rate case as a vehicle for disproportionate rate increases on ostensibly money-losing products except to the extent that disproportionate losses, if any, on those products were themselves due to the extraordinary or exceptional circumstance. The 2007-2009 recession was not the cause of the losses allegedly resulting from noncompensatory rates on Periodicals Mail and Standard Mail Flats. The recession, if anything, reduced those losses by reducing the volume of those two mail groupings.

### A. The Legal Standard

The "due to" provision of 39 U.S.C. § 3622(d)(1)(E) effectively limits any exigent rate increase to recovery of losses that were *caused by* the 2007-2009 recession. The "plain meaning of [Section 3622(d)(1)(E)] requires a causal relationship between the exigent circumstances and the proposed rate adjustment," *USPS v. PRC*, 640 F.3d 1263, 1267 (D.C. Cir. 2011).

The Commission has repeatedly acknowledged this limitation. 39 C.F.R. § 3010.61(a)(3) requires that any request for an exigent rate increase include a "full discussion of the extraordinary or exceptional circumstance(s) giving rise to the request, and a complete explanation of how both the requested overall increase, and the *specific rate increases* requested, relate to those circumstances." (Emphasis added.)

The Commission reaffirmed this in its September 30, 2010, order denying the Postal Service's original exigent rate request in Docket No. R2010-4:

> While the recession and volume declines may contribute to the problem, it is incumbent on the Postal Service to demonstrate how the *specific rate increases it proposes flow from the particular circumstances that it cites as exceptional*.

Order No. 547 at 60-61 (emphasis added). Failure to satisfy this requirement, the Commission added, requires rejection of the rate increases:

> A review of those statements [from the Postal Service's witnesses], including their oral testimony, fails to reveal how either the rate increases in general, *or the specific rate increases proposed*, relate to the extraordinary or exceptional circumstances that purportedly give rise to them.

*Id*. at 60 (emphasis added).

The Commission elaborated on this point in its brief as respondent in defense of Order No. 547 in the D.C. Circuit. In response to the Postal Service's contention that any exigent rate increase could be justified by the chronic failure of Periodicals Mail to cover its reported attributable costs, the Commission stated:

> The Postal Service's justifications for its specific pricing proposals underscore its misunderstanding of the proper role for exigency-based increases. As another Postal Service witness explained, "[p]eriodicals has been losing money as a class for years," and the "inflation-based price cap limitation at the class level has made it difficult to make significant progress in restoring Periodicals to complete cost coverage." Kiefer Statement 39 [Supp. App. 39]. The Postal Service thus saw this "price change" as a "unique opportunity to take some steps toward increasing

> Periodicals revenue and improving cost coverage." *Id*. Again, the authority to raise prices due to either extraordinary or exceptional circumstances was not designed to provide a "unique opportunity" to address problems that have persisted "for years." Rather, the new pricing regime was designed to require the Postal Service, absent exigent circumstances, to address such issues through improved efficiency while operating within the constraints of the price cap.

Brief of PRC as respondent in *USPS v. PRC*, No. 10-1343 (D.C. Cir., filed January 14, 2011) at 35-36.

The Commission was correct. Using the exigency provision to address longstanding issues would allow the Postal Service to use the occurrence of an exigent circumstance to nullify the central pricing constraint established by the Postal Accountability and Enhancement Act ("PAEA"), and the protections it gives mailers of market-dominant products. The CPI-based price cap is the *only* protection that mailers have from abuse of the Postal Service's monopoly power through excessive price increases: PAEA repealed the cost-of-service ratemaking standard that previously protected users of market-dominant products. Expanding the exigency provision from a limited escape valve into an all-purpose vehicle for recovering losses of all kinds would leave captive mailers without any effective protection at all.

The Commission's subsequent decisions on remand from *USPS v. PRC*, 640 F.3d 1263, 1268 (D.C. Cir. 2011), underscored that any extra money recovered through an exigent increase must be due to the exigent circumstance, and the Postal Service "must factor out the financial impact of non-exigent circumstances":

> When quantifying the net adverse financial impact of the exigent circumstances, the Postal Service must factor out the financial impact of non-exigent circumstances, such as the continuing effects of electronic diversion. This process ensures that an exigent rate adjustment is limited

> to the adverse effects of the exigent circumstances as opposed to other, non-exigent factors.

Docket No. R2010-4R, Order No. 864 (September 20, 2011) at 48-51. *See also id*. at 45 (emphasis added):

> An exigent rate adjustment may only be used to compensate for the adverse financial impacts of exigent circumstances that are over and above adverse impacts the Postal Service would encounter in the normal course of business. This ensures that an exigent rate adjustment defrays only those expenses that the Postal Service was not expected to recover under the price cap. Such a result is consistent with the language of the section 3622(d)(1)(E), the purposes and policies of the PAEA, the role of the exigency provision in the statutory scheme, and the legislative history underlying the exigency provision. [footnote omitted]
>
> The Commission finds that exigent rate adjustments must be causally linked to the net adverse financial impact of the exigent circumstances rather than the amount of revenue lost. Given the exigent circumstances found to have occurred in this case, the net adverse financial impact would consist of *the lost contribution associated with the volume declines from the 2008-2009 recession*.[3]

*Accord*, Order No. 1059 (December 20, 2011) at 6-7; Order No. 864 at 33-35 ("a broader interpretation of the exigency provision would undermine the purposes and policies of the PAEA"); Docket No. R2010-4, Order No. 547 (September 30, 2010) at 53-61. While the immediate focus of the statements quoted above was on losses caused by the long-term trend of electronic diversion, the same logic applies with equal force to losses caused by the setting of prices on certain mail products below reported attributable costs, an equally long-term issue.

[3] The recession officially began in late 2007 and ended in mid-2009. In terms of the Postal Service and federal government fiscal years, this was FY 2008-2009. The undersigned parties have stated the dates in their comments in calendar year terms, i.e., as 2007-2009.

The Commission may not "depart[] from established precedent without a reasoned explanation." *LePage's 2000, Inc. v. PRC*, 642 F.3d 225, 231-234 (D.C. Cir. 2011) (citing *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C.Cir.1995); and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)). No principled basis for departing from the Commission's disposition of this issue in R2010-4 and R2010-4R has been offered, and none exists.

The Commission's recognition in Order No. 864 (at 45) that an exigent rate adjustment may "defray[] only those expenses that the Postal Service was not expected to recover under the price cap" is especially telling. When Congress established the CPI cap by enacting PAEA in 2006, Congress was well aware of the chronic failure of Periodicals Mail to cover its reported costs. For this reason, Section 708 of PAEA, 120 Stat. 3246, directed the Commission and the Postal Service to conduct a joint study on

> (1) the quality, accuracy, and completeness of the information used by the Postal Service in determining the direct and indirect postal costs attributable to periodicals; and (2) any opportunities that might exist for improving efficiencies in the collection, handling, transportation, or delivery of periodicals by the Postal Service, including any pricing incentives for mailers that might be appropriate.

(Section 708 was the basis for the Joint Report issued by the Commission and the Postal Service in September 2011.) Despite this awareness, Congress did not exempt Periodicals Mail from the CPI cap generally applicable to rates on market-dominant classes established by Section 201(a) of PAEA (codified at 39 U.S.C. § 3622(d)). The omission of any explicit exception to the CPI cap for Periodicals Mail comparable to Section 3622(d)(1)(E), the limited exception for "extraordinary or exceptional circumstances," requires the inference that Congress intended for the Commission and the Postal Service to solve the problems of Periodicals Mail within the constraint of the CPI cap.

### B. The Postal Service's Reported Losses On Periodicals Mail and Flat-Shaped Standard Mail Are Chronic And Longstanding.

The failure of Periodicals Mail and Standard Mail Flats to cover the costs attributed to them by the Commission, and the asserted causes of this phenomenon, are longstanding and unrelated to the 2007-2009 recession. As the Commission and the Postal Service noted in 2011, "concerns about seemingly disproportionate increases in Periodicals costs were raised in a series of omnibus rate cases and at industry meetings with the Postal Service" for "many years" before the enactment of the Postal Accountability and Enhancement Act in 2006. *Periodicals Mail Study: Joint Report of the USPS and PRC* (September 2011) at 16. Periodicals Mail revenue has not covered the costs attributed to the class by the Commission in any year since 1996. *Id*. at 13-15. The same is likely true for Standard Mail Flats, although no cost coverage data are available prior to FY 2008 because Standard Mail Flats was not a mail class or subclass under the PRA. Accord, Valpak Comments at 52-53 (tabulating annual losses reported by Commission on Periodicals Mail since 1997).

These longstanding conditions are not the stuff of which exigent rate increases are made. As noted above, the Commission specifically found in Order No. 864 (at 45) that an exigent case based on the recession may recover only "the lost contribution associated with the volume declines from the . . . recession." Even Valpak, the most ardent advocate of above-CPI increases for Periodicals and Standard Mail Flats in

Commission proceedings, has acknowledged that "liquidity problems arising from underpricing of underwater products cannot meet the 'extraordinary or exceptional' criteria for an exigent case." Valpak Comments at 61. "A price increase to help management offset prior and continuing losses on unprofitable products is not the purpose of the exigency escape clause." *Id*. at 103.

### C. The 2007-2009 Recession *Reduced* The Postal Service's Reported Losses From Periodicals Mail and Standard Mail Flats.

To the extent that the 2007-2009 recession had any effect at the margin on the losses incurred by the Postal Service from Periodicals Mail and Standard Mail Flats, the effect was to *reduce* those losses. If the revenue generated by a product fails to cover the additional cost of each extra unit sold, selling fewer units means smaller total losses. Dr. John Haldi, Valpak's economic consultant in this docket, has acknowledged this: "basic economics, as well as common sense, indicate that when a product is losing money because the product's variable unit costs exceed the price, profitability will increase as volume of the product declines." Valpak Comments, *supra*, Haldi Appendix at 3.

This economic reality alone bars any exigent increase on Periodicals Mail and Standard Mail Flats. As noted above, the Commission has held that (1) "exigent rate adjustments must be causally linked to the net adverse financial impact of the exigent circumstances rather than the amount of revenue lost," and (2) "the net adverse financial impact would consist of the lost contribution associated with the volume declines from the 2008-2009 recession." Order No. 1059 at 6-7. If a volume decline produces a *gain* in contribution, there is no "net adverse financial impact." Without a "net adverse financial impact," there can be no "exigent rate adjustment." *Id*.

## III. THE LOSSES REPORTED ON PERIODICALS MAIL AND STANDARD MAIL FLATS DO NOT REFLECT BEST PRACTICES OF ECONOMICAL AND EFFICIENT MANAGEMENT.

Disproportionate price increases for Periodicals Mail and Standard Mail Flats would violate Section 3622(d)(1)(E) on a second and independent ground: the record does not establish that the Postal Service would suffer losses on these products if it followed "best practices" of "efficient" and "economical management." 39 U.S.C. § 3622(d)(1)(E). To the extent the costs are properly attributed, the Postal Service's reported losses on Periodicals Mail and Standard Mail Flats result not from lagging rates, but from out-of-control cost increases despite continuing increases in the quality and worksharing of the mail entered by periodical publishers and users of Standard Mail Flats.

Rate increases for Periodicals Mail have far outstripped inflation since 1996. As shown in the following table, the average increase in Periodicals rates from FY 1996 to FY 2012—70 percent—was substantially higher than (1) the price increase for other classes of mail; *and* (2) the general rate of inflation:

**Postal Rate Increases v CPI-U (1996-2012)**

| Fiscal Year | Rate Increases | | | | CPI-U |
|---|---|---|---|---|---|
| | First-Class Mail | Periodicals | Standard Mail | Pkg Services | |
| 1997 | | | | | 2.7% |
| 1998 | | | | | 1.6% |
| 1999 | 2.5% | 5.1% | 3.0% | 1.9% | 1.9% |
| 2000 | | | | | 3.2% |
| 2001 | 3.5% | 12.7% | 8.4% | 8.1% | 3.2% |
| 2002 | 7.9% | 10.0% | 7.1% | 5.0% | 1.5% |
| 2003 | | | | | 2.3% |
| 2004 | | | | | 2.3% |
| 2005 | | | | | 3.3% |
| 2006 | 5.2% | 5.1% | 5.4% | 5.1% | 3.7% |
| 2007 | 7.0% | 11.8% | 9.3% | 12.0% | 2.3% |
| 2008 | 2.9% | 2.7% | 2.9% | 2.9% | 4.4% |
| 2009 | 3.8% | 4.0% | 3.8% | 3.8% | -0.3% |
| 2010 | | | | | 1.7% |
| 2011 | 1.7% | 1.7% | 1.7% | 1.7% | 2.7% |
| 2012 | 2.1% | 2.1% | 2.1% | 2.1% | 2.4% |
| 1996-2012 | 43.0% | 69.9% | 52.9% | 51.1% | 46.7% |

The Standard Mail Flats product has also experienced disproportionate rate increases. For example, the price for a 3.3-Ounce, 5D-Presort, DSCF-Entered, Automation Flat increased by 87 percent between Fiscal Year 1996 and Fiscal Year 2013. *See* Domestic Rate History, USPS Notice 123. The price of a 3.3-Ounce, 3D-Presort, DSCF-Entered, Automation Flat increased by even more during the same period: 141 percent. *Id*.

Unfortunately, the Postal Service's reported costs have increased even faster. The average unit cost for Periodicals Mail increased by 92 percent from FY 1996 to FY

2012. Calculated from CRA Reports; BLS Series ID CUUS0000SA0. This growth rate was *double the rate of inflation* during the same period.[4] Going back further, the Postal Service's average unit costs of handling Periodicals increased by 76 percent from FY 1985 to FY 2012 in real (i.e., inflation-adjusted) terms.[5] ***Had the Postal Service simply held the increase in Periodicals unit costs from FY 1985 to FY 2012 to the rate of inflation during these periods, Periodicals revenue would have covered attributable costs in FY 2012***.[6]

Standard Mail Flats are a similar story. Since FY 1998, the costs attributed to Standard Mail Flat have far outstripped the increase in input factor prices. Docket No. ACR 2012, Initial Comments of American Catalog Mailers Association (February 1, 2013) at 8, Graph 1.

These trends cannot be blamed on the mail itself. As MPA, ANM, and ABM detailed in Docket No. ACR2010, limiting increases in Periodicals unit costs to inflation during this period should not have been difficult. During this period, both automation of the flats mailstream and the amount of worksharing increased, and there were no

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[4] FY 1996 is used as the starting period for this analysis because it is the last year in which Periodicals revenues were estimated by the PRC to cover attributable costs, not because the Postal Service efficiently processed flats in FY 1996. In fact, USPS cost trends were no better in the previous decade. From FY 1986 to FY 1996, Periodicals unit costs increased by 95 percent while the CPI only increased by only 42 percent. (Source: calculated from USPS Cost and Revenue Analysis reports and Bureau of Labor Statistics Series ID CUUR0000SA0.)

[5] Source: FY 1985 and FY 2012 CRA Reports; 1985 unit costs inflated to 2012 using CPI-U (Series ID CUUR0000SA0) data from stats.bls.gov.

[6] Had real Periodicals unit costs stayed constant from FY 1985 to FY 2012, FY 2012 Periodicals costs would have been 43 percent lower (1-1/1.76).

offsetting trends that should have increased costs. Docket No. ACR2010, Comments of MPA, ANM, and ABM (Feb. 2, 2010) at 8-11. These worksharing trends have continued or accelerated since then:

(1) Primarily because of increased comailing, the percentage of Periodicals pieces sorted to the Carrier Route level increased from 44.1 percent in FY 1996 to 64.5 percent in FY 2012. Docket No. R97-1, USPS-LR-H-145; Docket No. ACR2012, USPS-FY12-4, FY 2012 Periodicals.xls.

(2) The percentage of Periodicals Outside County volume (in terms of advertising pounds) entered at the Destination Sectional Center Facility ("DSCF") or Destination Delivery Unit ("DDU") increased from 30.0 percent in FY 1996 to 67 percent in FY 2012. Docket No. ACR2012, USPS-FY12-4, FY 2012 Periodicals.xls.[7]

(3) Between FY 1996 and FY 2012, the Postal Service changed mailing standards to eliminate the use of "skin sacks," a practice identified as significantly driving up Periodicals costs. Docket No. R2005-1, *Postal Rate and Fee Changes, 2005*, USPS-LR-K-49 at 19-20. Primarily because of this change, but also because of an increase in co-mailing, which allows the substitution of pallets for sacks, the number of sacks

[7] This comparison is focused on DDU and DSCF-entered Outside-County advertising pounds because data are unavailable to compare the percentage destination-entered for the entire class. The destination entry trend for Periodicals as a whole is substantially similar for two reasons: (1) Periodicals Outside-County volumes comprise the vast majority of all Periodicals; and (2) most destination-entered Periodicals are entered at the DSCF.

used to mail Outside County Periodicals dropped by 80 percent from FY 2004 to FY 2012. Docket No. R2005-1, USPS-LR-K-91, Tables.xls, "Table 3"; Docket No. ACR2012, USPS-FY12-4, FY 2012 Periodicals.xls.[8]

Despite the mailers' intensified worksharing, the Postal Service's costs have gone in the wrong direction. As the Commission found in its FY 2012 Annual Compliance Determination (at 96; emphasis added):

> ***The increase in Periodicals mechanized processing costs is notable when evaluated in conjunction with mailing trends***. From FY 2010 to FY 2012, the percentage of Periodicals volume presorted to Carrier Route increased from 59 percent to 63 percent. Similarly, mailer use of pallets, as opposed to sacks, has also increased. ***All things being equal, these improvements in mailer preparation and worksharing should decrease the cost of Postal Service processing.*** The increase in Postal Service processing cost highlights the importance of the Postal Service identifying and incentivizing mail that it can efficiently process. The ongoing decline in AFSM productivity also contributed to the increase in mechanized processing costs. AFSM Incoming Secondary productivity declined 7.1 percent from FY 2011 to FY 2012, and has declined 17.7 percent since FY 2008.

Mailers of Standard Mail Flats have likewise increased the quality and intensity of their mail preparation and worksharing (including both presortation and dropshipping) during the same period. In particular, the percentage of catalogs that are comailed has grown dramatically over the past decade.

The reasons for the Postal Service's failure to manage the costs of Periodicals Mail and Standard Mail Flats have not been fully identified. It is clear, however, the Postal Service has not come close to following "best practices" of "efficient and

[8] The USPS also implemented charges for sacks and flats tubs.

economical management" (39 U.S.C. § 3622(d)(1)(E)) in either its operations or its pricing for these kinds of mail.

The causes of these chronic excess costs are numerous. Current issues include:

- Bundle breakage on APPS (poor machine design)
- SPBS keying errors
- Retention of "Hot 2C" policies in field (despite industry requests to eliminate practice)
- Decentralized manual incoming secondary processing
- AFSM 100 efficiency / capacity issues
- SPBS and APPS capacity issues
- Mail transport equipment shortages
- Class-specific AFSM 100 incoming secondary operations
- AFSM 100 processing in FSS zones
- Problems keeping labeling lists up-to-date
- CET disconnect in non-FSS zones (manual handling necessary to meet service standards)
- Removal of UFSM 1000s (shifting processing from machines to manual)

Two high profile recent examples are the FSS rollout and the persistence of manual processing of flats.

***The FSS rollout.*** The Postal Service has completed the Phase 1 deployment of Flats Sequencing Systems ("FSS")—long touted as the savior of flats. Unfortunately, the deployment has thus far been a failure, as the Postal Service recently conceded in the Annual Compliance Determination proceeding for Fiscal Year 2012:

> Based on available information from part (a) of this question for Periodicals and Standard Mail Flats and the information from the response to Question 5 of Chairman's Information Request No. 3 on Standard Mail Carrier Route, we can say the following. It appears that in FY 2012, FSS raised costs for these three products as compared with FY 2010 costs.

Docket No. ACD 2012, USPS Response to CHIR No. 5, Q 24(b).

One reason for these problems appears to be poor Postal Service management of the procurement of the equipment from its manufacturer. The project has collapsed into litigation, with cross-claims by the Postal Service and its vendor seeking hundreds of millions of dollars of damages. Northrop Grumman Corp. Form 10Q (Sept. 30, 2013) at 11.

Another reason is the failure of the Postal Service to implement prices that encourage mailers to prepare flat-shaped mail to maximize potential FSS efficiency. As the Postal Service recently acknowledged in Docket No. R2013-10, until now "the efficiency gains that FSS machines produce are limited by the fact that most flats destinating within the ZIP Codes served by FSS machines have not been prepared to maximize FSS efficiency." USPS Request (September 26, 2013) at 16.

***Continued manual processing of flats.*** Despite its massive investments in flats automation, the Postal Service continues to process a substantial volume of flats manually. A report of the Postal Service Office of Inspector General earlier this year on the costs of processing flat-shaped mail found that, despite investments in mail processing equipment, about 30 percent of flats were processed manually in FY 2011—

only a modest improvement in performance from the 33.3 percent figure of FY2003. OIG Report No. MS-AR-13-003, *Flat-Shaped Mail Costs* (Jan. 4, 2013) at 3. This rate of manual processing is 50 percent above the goal of 20 percent that the Inspector General believes is achievable. The excessive manual processing costs the Postal Service millions of workhours each year. *Id.* at 10, 16.

The Commission has repeatedly urged the Postal Service to seize the available opportunities to rationalize the costs of processing, transporting and delivering flats, which are much higher than the corresponding costs of letter mail. *See*, *e.g.*, *Periodicals Mail Study* at 97; FY 2011 ACD at 105; FY 2012 ACD at 97. The excessive costs have remained, however.

The Postal Service's *pricing* of Periodicals Mail and Standard Mail Flats has also been inefficient. Many worksharing passthroughs have remained stubbornly below 100 percent. Bundle and container prices have also failed to reflect full cost differences. In Order No. 1446 in Docket No. C2004-1, the Commission urged the Postal Service to consider changes in rate design that would improve the efficiency of Periodicals. The Commission declined to prescribe any such changes in that case. In Docket No. R2006-1, the Commission did prescribe substantial changes in Periodicals rate elements. However, because the Postal Service continues to base charges for the new rate elements and the Carrier Route discount on much less-than-full passthroughs, many of the inefficiencies identified in Docket No. C2004-1 remain in place today, a decade later. The Commission has noted these issues repeatedly in its Annual Compliance Determinations in recent years. *See*, *e.g.*, FY 2010 ACD at 90; FY 2011

ACD at 103, 105, 108; FY 2012 ACD at 8, 97, 101. Yet the dysfunctional price structures have remained.

The rate design for Standard Mail Flats has its own inefficiencies. For example, Standard Mail Flats, unlike Periodicals, have no rates for containers or bundles at all. Additionally, the Postal Service continues to base destination entry discounts on incomplete passthroughs. Taufique Statement, Appendix A, Page 10.

No serious observer of Postal Service operations and pricing for Periodicals Mail and Standard Mail Flats has suggested that these products are handled or priced in an efficient fashion. Instead, the Postal Service (and, to a lesser extent, the Commission) have asserted that, because their bottom-up analyses of Postal Service costs for these kinds of mail have not identified specific potential dollar savings equal to the total shortfall in attributable cost coverage, a permanent solution to the problems for this mail must include price increases as well as efficiency improvements. Thus, the Commission concluded in the 2011 *Periodical Mail Study* that, while processing flat-shaped Periodicals as efficiently as flat-shaped Standard Mail could save the Postal Service an estimated $349 million per year, potential "operational efficiencies" would not completely eliminate the shortfall in cost recovery. The potential cost savings acknowledged by the Postal Service in the 2011 report were much smaller. *Id*. at 2, 78-80, 98.

The Postal Service, and even the Commission, had the burden of proof backwards. As noted above, the Postal Service's real (i.e., inflation-adjusted) costs of handling Periodicals increased by 76 percent from FY 1985 to FY 2012; if the costs had merely kept even with inflation, the Periodicals Mail would be covering attributable costs today. Even the Commission's estimate of potential cost savings, which is higher than the Postal Service's, would leave the Postal Service's inflation-adjusted cost of handling Periodicals higher than in 1985—despite 27 years of technological advances and vastly increased worksharing by periodical publishers and their mail services providers. These facts are incongruous. Their only plausible explanation is gross inefficiency. To punish mailers with disproportionate price increases in the absence of a credible alternative explanation for the Postal Service's out-of-control costs amounts to blaming the victim.

## IV. ABOVE-AVERAGE INCREASES ON RATES FOR STANDARD MAIL FLATS AND PERIODICALS MAIL WOULD REDUCE THE POSTAL SERVICE'S NET CONTRIBUTION OVER THE LONG RUN.

Above-average price increases on Periodicals Mail and Standard Mail Flats would be inappropriate for a further reason: they are likely to decrease, not increase, the Postal Service's net contribution in the long run.

First, both Periodicals Mail and Standard Mail Flats generate a considerable volume of other, higher-markup mail products. The Standard Mail Flats product is largely the "residual" from Carrier Route flat mailings, which "have been profitable for quite some time." Tr. 1/42 (Taufique); Taufique response to POIR 11, Question 9(b). Stated otherwise, Standard Mail Flats and Carrier Route flats are a joint output; hence, price increases that suppress the volume of Standard Mail Flats will also suppress the volume of Carrier Route flats. Moreover, advertising catalogs, the primary component of Standard Mail Flats, generate bills (First-Class Mail) and product fulfillment shipments (Shipping Services), both of which are profitable. *Id*. at 42-43.

Periodical publishers also enter large volumes of high markup mail, including First-Class Mail and Standard Mail Letters for advertisements and First-Class Mail for billing, bill payments, and other customer correspondence. In 2011, MPA and several other trade associations of periodical publishers submitted a study by CDS Global, the largest provider of fulfillment solutions in support of the magazine publishing industry, of the postage expenditures of 460 business-to-consumer and business-to-business publications that spent a total of approximately $1 billion in postage annually. The CDS study found that only 60 percent of what the publishers spent on postage was in the Periodicals Mail class.[9]

**Periodical Publisher Postage by Mail Class/Type**

| Mail Class/Type | % of Total Postage Paid |
|---|---|
| **Periodicals** | 60.1% |
| **Standard Mail (Primarily Letters)** | 29.0% |
| **First-Class Mail (Primarily Letters)** | |
| Letters | 6.6% |
| Business Reply Mail | 2.4% |
| Courtesy Reply Mail | 1.5% |
| **Other** | |
| Address Change Service (ACS) | 0.2% |
| PO Box, PERMIT, Accounting Fees | 0.2% |

Source: CDS Global Study.

[9] Docket No. ACR2010, MPA-ANM-ABM comments (February 2, 2011) at 19-21. A Postal Service analysis of the Top 100 Periodicals mailers strongly suggests that the contribution of Periodicals publishers is even higher. The analysis shows that an even smaller percentage -- less than half -- of the postage these mailers spend is in the Periodicals class with the remainder primarily in the high-contribution Standard Mail and First-Class Mail classes. Docket No. R2010-4, Response of James Kiefer to POIR No. 3, Question 10.

As the table below shows, the First-Class Mail and Standard Mail contributions more than offset the purported loss of the Periodicals sent by publishers:

**FY 2010 Periodical Publisher Mail Volume and Contribution (in Millions)**

| Mail Class/Product | Volume | Contribution |
|---|---|---|
| First-Class Mail Single-Piece Letters/Cards | 326 | $ 60 |
| First-Class Mail Presort Letters/Cards | 696 | 163 |
| Periodicals | 7,269 | - 611 |
| Standard Mail Letters | 4,752 | 404 |
| **Total** | **13,043** | **$ 16** |

Source: Volumes from CDS Global Study (inflated to reflect total FY 2010 Periodicals Mail volume); unit contributions from FY 2010 CRA Report.

The study confirmed the results of a 2007 MPA study of a subset of MPA members that accounted for approximately 25 percent of the total postage received by the Postal Service from Periodicals Mail. The 2007 study indicated that, for every dollar spent on Periodicals postage, the publishers spent approximately 18 cents in First-Class Mail postage and 42 cents in Standard Mail postage. Moreover, the study found that (1) the First-Class Mail and Standard Mail categories used by periodical publishers are high-markup categories that pay significant contributions per piece to institutional costs; and (2) the positive contribution from these complementary mail classes used by Periodicals publishers almost completely offset the negative contribution of $643 million assertedly generated by Periodicals mail. *See* Docket No. ACR2009, MPA/ANM Reply Comments (filed on 2/23/2010) at 2.

Given these facts, there is no reason to believe that the *overall* contribution of *all* mail products entered by senders of Periodicals Mail and Standard Mail Flats is negative—or would be negative, if the Postal Service brought its costs under control.

Second, there is significant evidence that the demand for flat-shaped mail is sufficiently price elastic to make an above-average price increase on Standard Mail Flats self-defeating, particularly in the longer run. In Fiscal Year 2012, the Postal Service increased prices for Standard Mail Flats by 2.209 percent, slightly more than the 2.041 percent increase in prices for Standard Mail overall. FY 2012 Annual Compliance Determination at 21 n. 10 (citing Order No. 987 in Docket No. R2012-3 (November 22, 2011) at 19-20). The Postal Service submitted evidence showing that more aggressive price increases would tend to reduce the net contribution that the Postal Service could earn from Standard Mail Flats over the long run. The Commission found that, "under current circumstances, the Postal Service is making reasonable progress toward addressing the issues raised in the 2010 ACD, that no changes in the 2010 ACD directive are necessary, and that the Postal Service should proceed with its proposed three-year schedule of price increases and operational changes to reduce flats costs." FY 2012 Annual Compliance Determination at 22 & 116.

Similarly, in the most recent CPI-based rate increase case, Docket No. R2013-10, the Postal Service proposed a price increase of 1.810 percent for Standard Mail flats, about 1.05 times the overall increase for the class, 1.607 percent. Order No. 1890 (November 21, 2013) at 66. The Commission found that this rate of increase complied with Section 3622 and the Commission's directive in ACD 2010 to "move the product toward 100 percent cost coverage." *Id*. at 68-69.[10]

Nothing submitted in Docket No. R2013-10 or R2013-11 suggests that a higher increase would be contribution-positive over the long run.[11] The elasticity model offered by Valpak witness Haldi has the same limitations noted by the Commission in its FY 2012 ACD at 116 and by Lawrence G. Buc in a statement filed on November 26, 2013, on behalf of a coalition of users of presorted First-Class and Standard Mail. *See also* Taufique response to POIR 11, Question 8 ("Standard Mail own-price elasticities are not known with enough certainty to justify mechanistic application in a model whose legitimacy (e.g., vis-à-vis "maximizing" contribution) relies to a great extent on those elasticities.").

More credible are the elasticity estimates derived by Mr. Buc from the internal optimization models relied on by several major catalog mailers to guide their own mailing decisions. Run at varying percentage increases in the real price of postage, the business models indicates that the price elasticity of demand for Standard Mail Flats ranges from -1.75 (for a real price increase of four percent) to -1.17 (for a real price increase of 20 percent). Buc Statement at 13-14. These figures indicate that the

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[10] The proposed increase has since been revised to 2.078 percent to equalize the commercial and nonprofit 5-Digit Automation Flat discount. *See* Order No. 1894 (December 2, 2013).

[11] The Postal Service's focus is rightly on long-run profitability, not just the short term (or more immediate) effect of price changes on volume." Taufique response to POIR 11. Question 8(c).

demand for Standard Mail Flats mail service is elastic, and that the percentage loss of volume from an above-inflation price increase on Standard Mail Flats is likely to exceed the percentage gain in unit revenue.

**CONCLUSION**

Wherefore, the undersigned parties respectfully request that the price increases requested by the Postal Service be limited as explained in these reply comments and the initial comments cosponsored by these parties on November 26.

Respectfully submitted,


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**Appendix A**

## 39 U.S.C. § 3622(d) BARS THE POSTAL SERVICE AND THE COMMISSION FROM RAISING RATES ON ANY CLASS FASTER THAN INFLATION

### A. For Periodicals Mail, The CPI Cap of 39 U.S.C. § 3622(d) Trumps The Attributable Cost Floor of 39 U.S.C. § 3622(c)(2).

Except to the extent authorized by 39 U.S.C. § 3622(d)(1)(E), the Postal Service's failure to cover its costs does not give the Commission authority to impose or approve above-CPI rate increases for any class of mail.[12] Like the other "factors" and "objectives" of sections 3622(b) and (c), section 3622(c)(2) is subordinate to the "'out-of-bound' lines" established by the CPI-based cap on class prices (§ 3622(d)), the limit on worksharing discounts (§ 3622(e)), and the revenue ceilings for the various categories of preferred mail (§ 3626). Docket No. RM2009-3, *Consideration of Workshare Discount Rate Design*, Order No. 536 (Sept. 14, 2010) at 16-17. *Accord*, *id*. at 36 (emphasis added):

> Quantitative pricing standards are at the top of the statutory hierarchy. Next in the hierarchy are the qualitative "objectives" listed in section 3622(b), followed by the qualitative "factors" listed in section 3622(c). Under this hierarchy, violations of the three quantitative pricing requirements are "out of bounds." The Postal Service has broad flexibility to develop prices to achieve the qualitative objectives and factors of sections 3622(b) and (c) *so long as its prices are "in bounds" because they satisfy these quantitative requirements*.

[12] The other exception allowing above-CPI rate increases—the existence of unused rate increase authority within the meaning of 39 U.S.C. § 3622(d)(2)(C), does not apply here. Unused rate authority in both Periodicals and Standard Mail is currently negative.

The Commission reaffirmed this point in its Annual Compliance Determination ("ACD") for Fiscal Year 2010. Rejecting the Public Representative's contention in Docket No. ACR2010 that the attributable cost provision of 39 U.S.C. § 3622(c) stood on equal footing with the CPI-based price cap of section 3622(d), the Commission specifically held that the price cap trumps the attributable cost floor:

> The Public Representative reasons that the statutory price cap and the attributable cost floor provision in section 3622(c)(2) are on equal footing. This is based on the contention that section 3622(c)(2) is a quantitative requirement, notwithstanding its location with the cluster of statutory factors the Commission identified, in Order No. 536, as qualitative….
>
> Section 3622 creates a hierarchy based on "requirements," sections 3622(d) and (e), "objectives," section 3622(b), and "factors," section 3622(c). With the exception of an exigent rate request and use of banked pricing authority, the PAEA's price cap mechanism in section 3622(d)(1)(A) takes precedence over the statutory pricing objectives and factors in sections 3622(b) and (c), even if some of these can be considered quantitative. Therefore, to the extent an objective or factor with a quantitative component can be seen as competing with the price cap, the price cap has primacy . . .
>
> [T]he objectives and factors, including those that can be regarded as quantitative operate within the context of the price cap; they are not on an equal footing with it. However, giving precedence to the price cap does not render the attributable cost floor provision inconsequential. It advances the section 3622(b)(5) objective of assuring adequate revenues to maintain financial stability and promotes the recognition of other objectives and factors. Consequently, the Commission will continue to press for meaningful cost-reduction efforts, examination of costs, and use of pricing flexibility to promote PAEA policies.

FY 2010 ACD (March 29, 2011) at 18-19 (footnotes omitted). Hence, the failure of Periodicals rates to satisfy the attributable cost factor of 39 U.S.C. § 3622(c)(2) does not, without more, make Periodicals mail out of "compliance with" the Act as a whole.

As the Commission explained in denying Valpak's request for a finding of noncompliance in the same docket:

> The Commission concludes that the rates for Periodicals do not satisfy section 3622(c)(2), but it does not find FY 2010 Periodicals rates out of compliance with applicable provisions of chapter 36 or regulations promulgated thereunder. A finding that a product (either individually or collectively) fails to satisfy a provision of title 39 does not compel a finding of non-compliance. In making its determination, the Commission must take into account numerous sometimes conflicting considerations.

FY 2010 ACD (March 29, 2011) at 17.

On judicial review of the portion of the Commission's decision dealing with Standard Mail Flats, Valpak acknowledged to the Court of Appeals that the Commission's treatment of the Section 3622(d) price cap as a binding constraint on Periodicals prices was consistent with Commission precedent:

> The Commission has found that Periodicals prices cannot lawfully be raised to full cost coverage levels without violating the class-wide price cap.

Brief of Intervenors L.L. Bean, Inc., and Valpak in *USPS v. PRC*, No. 11-1117 (D.C. Cir., filed Dec. 7, 2011) at 25 n. 16. The court agreed with the Commission's reading of Title 39, finding that "the pricing" of Periodicals Mail (a product that is also a class) "is subject to special statutory restrictions." *USPS v. PRC*, 676 F.3d 1105, 1108 (D.C. Circ. 2012).

On remand, the Commission reiterated that it faced greater statutory constraints in raising prices for Periodicals mail because it is a class, not just a subset of a class:

> Moreover, the fact that Periodicals has only two products (Within County and Outside County Periodicals), neither of which covered its attributable

> costs, limits the opportunity for the Postal Service to improve attributable cost coverage by means of price increases while remaining within the Periodicals class price cap.

Docket No. ACR2010-R, *Annual Compliance Report, 2010*, Order No. 1427 (August 9, 2012) at 17. Because "96 percent of class revenues are provided by Outside County Periodicals, the Postal Services does not have the same flexibility to set prices substantially above the price cap as it does with respect to products within Standard Mail." *Id*. at 18 (citing FY2010 ACD at 94).

The Commission likewise alluded to this legal constraint in its Annual Compliance Review for the Fiscal Year 2011, ACR2011. Rejecting once again Valpak's request for an above-CPI rate increase on Periodicals Mail, the Commission noted, *inter alia*, that "unlike Standard Mail, Periodicals as a class fails to cover costs, thus foreclosing a rebalancing pricing strategy." FY 2011 *Annual Compliance Determination* (March 28, 2012) at 17.

Finally, the limit on Postal Service price increases imposed by Section 3622(d) constrains the Commission as well as the Postal Service. The CPI-based price cap is a constraint on rates, and binds the PRC and the USPS alike.

## B. None of the Other Ratemaking Provisions of Title 39 Create An Exception To The CPI Cap.

### 1. Section 3622(b)(5)

Section 3622(b)(5) states an "objective" that postal rates shall "assure" the Postal Service "adequate revenues, including retained earnings, to maintain financial stability." The Commission made clear in Docket Nos. RM2009-3, ACD2010 and ACD2011, however, that none of the "objectives" and "factors" of 39 U.S.C. §§ 3622(b) and (c), alone or in combination, override section 3622(d) in the hierarchy of Section 3622. The CPI-based price cap of section 3622(d) outweighs all of the objectives and factors combined. FY 2010 ACD (March 29, 2011) at 17-19.

### 2. Section 403(c)

39 U.S.C. § 403(c) which bars "undue or unreasonable discrimination among users of the mails" and "undue or unreasonable preferences to any such user." Valpak at 33, 38 and 129. "Discrimination" and "preferences" covered by Section 403(c), however, are limited to price or services differences among mailers and services that are "like" or similarly situated—a concept that is generally considered to be limited to ratepayers within the same rate class. Docket No. MC2012-14 and R202-8, *Valassis NSA*, Order No. 1448 (Aug. 23, 2012) at 33-35; Docket No. C2009-1, *Complaint of GameFly, Inc.*, Order No. 718 (April 20, 2011) at 44-63, remanded on other grounds, *GameFly, Inc. v. PRC*, No. 11-1179 (D.C. Cir., Jan. 11, 2013); *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990). Other mail classes are not similarly situated with users of Periodicals Mail. Periodicals Mail is a separate class from all other kinds of mail. It has different costs, demand characteristics and content—most notably in its "educational, cultural, scientific, and informational value to the recipient" under 39 U.S.C. § 3622(c)(11). Hence, differences between the contribution or cost coverage between Periodicals mail and *other* mail classes are governed by the rate reasonableness provisions of Section 3622, not the antidiscrimination provision of Section 403(c).

### 3. Sections 101(a) and 101(d)

Sections 101(a) and (d), which were added to Title 39 by the Postal Reorganization Act of 1970, establish a "policy" that postal rates "shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis" and "shall not be apportioned to impair the overall value of such service to the people." The Commission has held that these general policy desiderata are incorporated by reference into pricing in the catch-all "factor" of Section 3622(c)(14). Like Section 3622(c)(2), Section 3622(c)(14)—and, through it, section 101(a) and 101(d)—are subordinate to the CPI cap on class-average price increases imposed by Section 3622(d).

This conclusion is buttressed by the protean character of Sections 101(a) and 101(d). A directive to "apportion" overall costs in a way that is "fair and equitable" and does not "impair the overall value of such service" is essentially a directive to charge "just and reasonable rates," a broad and general requirement. *See*, *e.g*., *National Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 82526 (1983); *Verizon Communications Inc. v. FCC*, 535 F.2d 467, 501-502 (2002). To give Sections 101(a) or 101(d) priority over the specific CPI-based cap imposed by Section 3622(d) c) would violate the basic rule of construction that "the specific governs the general," particularly where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 2070-72 (2012) (citations omitted); *accord*, *Mail Order Ass'n of America v. USPS*, 986 F.2d 509, 515 (D.C. Cir. 1993).

The Court of Appeals' finding in *USPS v. PRC*, 676 F.3d 1105, 1108 (D.C. Cir.

2012), that "§ 3622(c) permits the Commission to invoke § 101(d) vis-à-vis market dominant products, at least in extreme circumstances" does not warrant a contrary conclusion. On remand of ACR2010 from the Court of Appeals, the Commission explicitly declined to construe § 101(d) as a general license for the Commission to "automatically, pursuant to 39 U.S.C. § 3653, find the Postal Service out of compliance and order remedial action . . . any time rates for a product fail to cover attributable costs" (Order No. 1427 at 4). Rather, the "totality of the circumstances presented is critical to Commission evaluations under section 3653." *Id*. Among the factors that the Commission identified as crucial were the

> failure of the Postal Service to address the shortfall by rate increases, cost decreases, or a combination thereof, *despite the capability to do so*; and failure of the Postal Service to provide an adequate explanation for not taking necessary remedial steps designed to ameliorate the cost coverage shortfall.

Order No. 1427 at 9 (emphasis added).

Applying these factors, the Commission specifically rejected Valpak's claim that §§ 101(d) and 3653 warranted above-CPI increases on Periodicals Mail. The Commission explained:

> Because of the special situation presented by the Periodicals class, [Valpak] urged the Commission to find that the Postal Service's pricing policies violate section 101(d) and that Periodicals prices should be increased substantially above the statutory cap . . . [B]ecause 96 percent of class revenues are provided by Outside County Periodicals, *the Postal Service does not have the same flexibility to set prices substantially above the price cap as it does with respect to products within Standard Mail*.
>
> * * *
>
> In the case of periodicals, the Postal Service faces a long-standing situation different than the one presented by Standard Mail Flats. As the

> Court itself recognized, the pricing of Periodicals is subject to special pricing limitations. 676 F.3d at 1108. Moreover, Periodicals, as a class, and both of the Periodicals products fail to cover costs, thereby limiting the opportunity for achieving full cost coverage by price increases within the price cap for the Periodicals class. To the extent permitted by the constraints of that price cap, the Postal Service has increased prices.

Order No. 1427 at 18-20 (emphasis added). *Accord*, *id*. at 17.

#### 4. Sections 3653 and 3662

Section 3653 is merely an enforcement mechanism, and does not establish substantive ratemaking standards in its own right. The Commission may take action against a rate under section 3653 only if the rate was in noncompliance with the "applicable provisions *of this chapter* [i.e., chapter 36 of Title 39] (or regulations promulgated thereunder)." 39 U.S.C. § 3653(b)(1) (emphasis added). The remedial provisions of 39 U.S.C. § 3662 in turn may be invoked in a Section 3662 complaint case or an annual compliance review proceeding only upon such a finding of noncompliance. *Id*., § 3653(c). Without any independent basis for a finding of noncompliance, no remedial action by the Commission under § 3653 or 3662 is "appropriate" under § 3653(c). *See* FY 2010 ACD (March 29, 2011) at 17 ("Given these considerations, the Commission need not address the scope of remedial powers under section 3653.").